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NO. 92-1763

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

VALENTINE SUGARS, INC.,
Petitioner

versus

DONAU CORPORATION
and
KRISHAN K. SUDAN
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit properly confirmed a commercial arbitration award which is rationally inferable from the wording or purpose of the contracts among the parties?

2. Whether a dispute over ownership of a piece of equipment was properly before the arbitration panel pursuant to a broad arbitration clause providing that "[a]ny dispute relating to or arising out of this Agreement . . . shall be decided by arbitration. . . ."?

3. Whether this Court should consider Petitioner's due process argument with respect to adequacy of notice where Petitioner failed to raise it below; and whether, in any event, the broad notice of arbitration given was sufficient to support the arbitration award?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Donau Corporation ("Donau") and Krishan K. Sudan ("Sudan"), submit this brief in opposition to the Petition for a Writ of Certiorari filed by Valentine Sugars, Inc. ("Valentine").

STATEMENT OF THE CASE

The commercial arbitration in this case concerned a dispute between the parties to a failed joint venture. Because the arbitrators did not — and were not required to[1] — make factual findings, the following is a brief summary of the contentions and evidence presented by Donau and Sudan in the arbitration proceedings.

In 1984, Donau and Sudan entered into a joint venture arrangement with Valentine for the purpose of manufacturing and selling spray dried phenolic resin in powder form for waferboard/OSB.[2] Pursuant to this arrangement, Valentine was to produce liquid resins using technology developed by Sudan. The corporation formed by the joint venture, Valdon, Inc., was

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[1] *E.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed. 2d 1424 (1960); *Antwine v. Prudential Bache Securities, Inc.*, 899 F.2d 410, 412 (5th Cir. 1990).

[2] Waferboard/OSB is a forest-based panel board composed of large wood chips adhered with phenolic resins mainly in powdered form.

to purchase these liquid resins and transform them into powdered form using a cone-bottom spray dryer with technology pioneered by Sudan. The spray dryer to be used by the joint venture already had been located by Donau and Sudan and, being central to the purpose and formation of the joint venture, was specifically identified in the Joint Venture Agreement. Valentine was to provide the financing necessary for the acquisition of the spray dryer and other necessary equipment for the sole benefit of the joint venture. This arrangement was set forth in a series of agreements, each executed on June 29, 1984.[3] The agreements required Valentine and Valdon to commence the manufacture of products not later than June 1985 and restricted use of Donau's and Sudan's technology for the sole purpose of manufacturing products for sale by or through Valdon.

Although the initial preparatory steps for the commencement of production proceeded as planned, Valentine advised Donau and Sudan just prior to the contractual deadline that it did not intend to provide all the necessary equipment to commence commercial production. Unbeknownst to Donau and Sudan, Valentine had begun negotiating a toll production agreement with a third party resin producer.

Donau provided Valentine with notice of default on the

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[3] The primary agreement was the Joint Venture Agreement (Rec. Vol. 2 at 359). Each of the following agreements is referenced in and attached to the Joint Venture Agreement: VSI Waferboard License (Rec. Vol. 2 at 329); Manufacturing Agreement (Ex. P-128); Valdon License (Rec. Vol. 2 at 393), Lease (Rec. Vol. 2 at 422); Sales Agreement (Ex. P-129); Voting Trust (Ex. P-130); VSI Molding Compound License (Rec. Vol. 2 at 407); Confidentiality Agreement (Rec. Vol. 2 at 372).

ground that Valentine had failed to commence the manufacture of products within the specific time. Donau also reminded Valentine of its obligations to protect the confidentiality of Donau's and Sudan's technology. Despite these notices, Valentine did not cure the default, canceled one of the agreements between the parties on January 3, 1986, and instituted this action on January 6, 1986.

In 1990, over four years later, Valentine entered into a three year contract with Georgia-Pacific Corporation to spray dry liquid resin supplied by Georgia-Pacific. In order to fulfill this contract, Valentine utilized the spray dryer purchased, according to the Joint Venture Agreement, "for Valdon's manufacturing process" and modified per Sudan's innovations.

Donau and Sudan contended in the arbitration that Valentine breached the various joint venture agreements in several respects:

(1) Valentine failed to use its best efforts to obtain the equipment necessary for Valdon's manufacturing process;

(2)Valentine failed to manufacture products within the time period specified by contract and, when served with a notice of default, failed to cure that default;

(3) Valentine engaged in negotiations with a potential competitor of Valdon in 1985 in violation of the exclusivity provisions of the agreement, as well as its fiduciary duties as a participant in the joint venture;

(4) Valentine misappropriated for its own benefit the licensed technology provided by Donau and Sudan under the pretense that the joint venture was not feasible, and failed to pay applicable royalties; and

(5) Valentine disclosed licensed technology to third parties in violation of the various confidentiality agreements.

Donau and Sudan suggested several damage calculations to the arbitrators based, *inter alia*, on royalties of one, three, five and eight cents per pound as specified in the various agreements, a 2% sales commission provided in one of the agreements, and a division of profits specified in the Joint Venture Agreement. (Rec. Vol. 2 at 523-26). The damage claims were based on actual and projected poundage production.

After conducting five days of hearings and receiving briefs from the parties, the arbitration panel issued the following award:

> All agreements have been terminated as of January 3, 1986.
>
> Donau Corporation and Krishan Sudan (hereafter referred to as CLAIMANT) are not entitled to any royalty payment for liquid or spray dried products produced by Valentine Sugars, Inc. (hereinafter referred to as RESPONDENT) or by Valdon prior to January 3, 1986.
>
> RESPONDENT fully owns spray drying equipment formerly owned by Valdon free of any ownership claims by CLAIMANT or Valdon.
>
> RESPONDENT shall pay to CLAIMANT the sum of SIX HUNDRED THOUSAND AND NO/100 ($600,000.00) DOLLARS.
>
> RESPONDENT shall pay to CLAIMANT $0.03/pound for all spray dried product produced after

January 1, 1991 on the spray drying equipment formerly owned by Valdon.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Found That the Award Was "Rationally Inferable" from the Contracts Between the Parties.

The questions raised by Valentine do not merit review nor does Valentine articulate any "special and important reasons" to support its argument that this Court should exercise its discretionary power of review. Rather, the Petition is nothing more than a plea by a dissatisfied litigant that the court below committed an error which this Court should now correct.

In essence, Valentine argues that the arbitrators made a material mistake concerning a fact which was not properly before them. According to Valentine, the arbitration award can only be read as "compensation for the divestiture of their [Donau's and Sudan's] interest in the spray dryer." Petition at 3; *see id.* at 9.[4] Valentine's central argument, however, is pure speculation. It ignores the evidence and contentions presented by Donau and Sudan to the arbitration panel as well as the alternative explanation of the award offered by Donau and Sudan found to be rational by the court below. Valentine's speculation cannot satisfy its very great burden of proving that the arbitrators exceeded their powers.

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[4] Before the Fifth Circuit, Valentine similarly contended that "the only discernable basis of the lump sum award of $600,000.00 and the 3 cents/pound royalty is as a liquidation of Valdon in an erroneously conceived equitable distribution to the claimants." Original Brief for Appellant at 21 (filed June 22, 1992).

The court below properly recognized that it was required to affirm the arbitration award in view of the "rational explanation" provided by Donau. 981 F.2d at 214. Thus, the Fifth Circuit applied earlier decisions recognizing that "courts will defer to the arbitrators' resolution of the dispute whenever possible" and that an arbitration award must be sustained where it is "rationally inferable" from the facts. *See Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2799, 115 L.Ed. 2d 972 (1991). Significantly, Valentine nowhere takes issue with this principle of law. Rather, Valentine simply argues that it was not properly applied in this case.

An examination of the result reached by the arbitrators in the context of the evidence and contentions presented to the arbitration panel by Donau and Sudan demonstrates that each element of the award has a plausible basis in the joint venture arrangement among the parties:

First, the arbitrators declared the various agreements among the parties terminated as of January 3, 1986. This date corresponds with the date Valentine canceled one of the agreements. Moreover, Valentine had not cured its default within the sixty-day cure period by this date. For all practical purposes, the joint venture arrangement was then dead.

Second, the arbitrators ruled that Donau and Sudan were not entitled to royalties on products produced prior to that date. This portion of the award is explainable because Valdon did not sell products prior to that date, although some product was produced.

Third, the arbitrators quieted title with respect to the spray drying equipment in favor of Valentine, Donau and Sudan having claimed that Valdon owned the spray dryer. (*See* discus-

sion at n.9, *infra*.) Through this portion of the award, the arbitrators recognized Valentine's ownership of the spray dryer. The award does not on its face transfer ownership. Significantly, Valentine does not argue with the result that title was quieted in its favor.

Fourth, the arbitrators awarded Donau and Sudan a lump sum of $600,000. This amount is less than the amount of past damages sought by Donau and Sudan based on post-termination royalties set forth in the contracts. Indeed, the royalties due to Donau based on the production arising out of the Georgia-Pacific contract alone would amount to more than $600,000. Thus, the $600,000 lump sum award could very plausibly constitute compensation for the accrued royalty to Donau and Sudan as of the date of the arbitration award. Significantly, Valentine once suggested this interpretation of the award in one of its memoranda to the district court:

> No royalties were awarded to defendants for the periods prior to the date the arbitrators declared the agreements were terminated, *i.e.*, January 3, 1986. The reference in the second paragraph, pertaining to royalties (prior to January 3, 1986), intimates that royalties would be due after that date. By implication, the $600,000 award represents royalties for the period between January 3, 1986 and January 1, 1991.

(Rec. Vol. 3 at 772).

Fifth, the arbitrators awarded Donau and Sudan 3¢ per pound for all spray dried product produced after January 1, 1991. This award is less than the post-termination royalty provisions of the agreements which covered spray dried products.

In view of Valentine's conduct in misappropriating confidential technology and usurping joint venture opportunities, the lump sum award and continuing royalty are easily understandable. In this context, the lower court correctly ruled that Valentine had not demonstrated that the arbitrators "strongly relied" on a mistake of fact. 981 F.2d at 214. The Fifth Circuit's analysis is consistent with the teachings of this Court:

> The courts are not authorized to reconsider the merits of an [arbitration] award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. . . .
>
> * * *
>
> But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37-38, 108 S.Ct. 364, 370-71, 98 L.Ed. 2d 286 (1987).

II. The Broad Arbitration Clause of the Joint Venture Agreement and the Broad Notice of Arbitration Provided by Donau and Sudan Were Each Sufficient To Support the Arbitration Award.

Because Valentine did not and cannot demonstrate that its construction of the arbitration award is the only rational explanation, Valentine's contentions concerning insufficient notice and lack of arbitrability of the ownership of the spray dryer are moot. The award recognizes that Valentine "fully owns" the

spray dryer and rejects all adverse claims of ownership by Donau and Sudan. As discussed above, it is far from certain that the arbitrators based the damage award or the continuing royalty upon the ownership issue. Moreover, all of the relevant agreements and documents were before the arbitrators,[5] and Valentine nowhere contends that it was denied the opportunity to present additional evidence. Valentine therefore cannot demonstrate any harm or prejudice caused by these alleged failings which would warrant review by this Court.

In any event, the court below followed the teachings of this Court as well as its own precedent to resolve all doubts in favor of arbitration[6] and properly rejected Valentine's related arguments that ownership of the spray dryer was not an arbitrable issue and that it received insufficient notice that ownership would be an issue. *See* 981 F.2d at 213-14.

With regard to whether the issue of ownership was arbitrable, Valentine argues that "the Lease Agreement was the document that determined ownership of the spray dryer and that

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[5] Valentine conceded to the court below that "the Lease Agreement was made available to the arbitrators." Valentine's Original Brief at 14 (filed June 22, 1992).

[6] *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54, 87 L.Ed. 2d 444 (1985); *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed. 2d 765 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .").

document did not have an arbitration clause." Petition at 6-7.[7] While Valentine is correct that the Lease Agreement did not contain an arbitration clause, the Lease Agreement was referenced in and attached to the Joint Venture Agreement, which was the primary agreement among the parties. Article 7 of the Joint Venture Agreement provides:

> Any dispute relating to or arising out of this Agreement (including, but not limited to, matters of construction or its actual or alleged breach) shall be decided by arbitration conducted in New Orleans under the Rules of the American Arbitration Association. . . .

(Rec. Vol. 2 at 373-74). This broad arbitration clause subjects all claims "relating to or arising out of" the contract to arbitration. In the present case, the dispute relating to the ownership of the spray dryer clearly falls within the broad arbitration clause of the Joint Venture Agreement as "any dispute relating to or arising out of" the Joint Venture Agreement because that Agreement: (1) established Valentine's obligation to purchase the spray dryer for Valdon's manufacturing process in the first place; (2) expressly referenced the Lease and included it as an attachment; and (3) is part of a series of interlocking agreements. In *AT&T Technologies, Inc. v. Communications Workers of America*, this Court stated that the presumption of coverage is "particularly

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[7] Valentine is incorrect on this point. The Joint Venture Agreement, not the Lease Agreement, is the source of Valentine's obligation "to use its best efforts to purchase the . . . spray dryer . . . and also the additional necessary equipment for Valdon's manufacturing process." (Rec. Vol. 2 at 364). Moreover, the Lease Agreement does not mention the spray dryer but only refers to "property described on Exhibit 'A'." That exhibit was not attached, however. (*See* Rec. Vol. 2 at 422).

applicable" where the arbitration clause is broad and reiterated that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, 89 L.Ed. 2d 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-80, 80 S.Ct. 1347, 1353-54, 4 L.Ed. 2d 1409 (1960)); *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 624 n.13, 105 S.Ct. at 3352 n.13. The Fifth Circuit's statement below, 981 F.2d at 213, n.2, that such a broad arbitration clause is intended to reach all aspects of the joint venture is consistent with an earlier decision, *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37-38 (5th Cir. 1990), and decisions of other circuit courts of appeal. *See, e.g., Federated Department Stores, Inc. v. J. V. B. Industries, Inc.*, 894 F.2d 862, 867 (6th Cir. 1990); *Ratheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 9 (1st Cir. 1989).

Valentine also argues that the notice of arbitration in this matter did not comply with the rules of commercial arbitration published by the American Arbitration Association and for that reason fails to comply with the requirements of due process. Petition at 4, 6. This argument is completely without merit for several reasons. First, Valentine did not raise the issue of noncompliance with the notice rules of the American Arbitration Association until it filed its Petition for Rehearing of Appeal on February 16, 1993. Even then, Valentine did not argue that noncompliance with the notice rules of the American Arbitration Association deprived it of due process. *See* Petition for Rehearing of Appeal at 3-6. Because the issue was not timely raised before the arbitrators or courts below for resolution, this Court need not address it. *See Youakim v. Miller*, 425 U.S. 231, 233, 96 S.Ct. 1399, 1401, 47 L.Ed. 2d 701 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court").

Second, the arbitration notice itself requests arbitration of a "dispute concerning a commercial matter involving several contracts signed on the 29th day of June, 1984 . . ." and specifically references each of the agreements, including the Joint Venture Agreement and the Lease Agreement[8]. The notice then describes the overall joint venture and the alleged various breaches by Valentine. It further requests that the arbitrators "determine the amount due and payable to the Plaintiffs...." In view of the broad notice given and commercial arbitration rule 43 of the American Arbitration Association empowering the arbitrators to "grant any remedy or relief which is just and equitable and within the scope of the agreement of the parties. . . ," the broad notice of arbitration was sufficient to support the arbitration award.[9]

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[8] Donau and Sudan can find no objection in the arbitration record by Valentine to the inclusion of the Lease among the agreements subject to arbitration, and Valentine has cited none.

[9] Contrary to its present contentions before this Court, Valentine previously acknowledged to the court below that there was at least one brief discussion of the ownership claim during the presentation of testimony before the arbitrators. *See* Valentine Reply Brief at 5-6 (filed Aug. 14, 1992) (referencing Rec. Vol. 2 at 409-11). Additionally, Donau's and Sudan's discussion of the issue in their reply brief to the arbitrators was in express response to assertions of ownership by Valentine in its prior brief. (Rec. Vol. 2 at 497).

CONCLUSION

It is respectfully submitted that Valentine has failed to sustain its burden of establishing that there are special and important reasons why a Writ of Certiorari should be granted. Valentine has not argued or demonstrated that the Fifth Circuit's decision conflicts with a decision of this Court or another circuit court or that it represents a departure from the accepted and usual course of judicial proceedings. Nor has Valentine presented an important, unresolved issue of federal law. Rather, Valentine merely asks this Court to blindly accept its construction of the arbitration award and to completely ignore all other explanations. Valentine's position is nothing more than a request that this Court correct a perceived error in a lower court decision. Accordingly, Valentine has not shown any reason why this Court should exercise its sound judicial discretion to entertain this case.

Dated June 4, 1993.

Respectfully submitted,

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